

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

**IN RE: NATIONAL PRESCRIPTION
OPIATE LITIGATION**

*The County of Summit, Ohio, et al. v.
Purdue Pharma L.P., et al.*
Case No. 18-op-45090

*The County of Cuyahoga, et al. v. Purdue
Pharma L.P., et al.*
Case No. 17-op-45004

MDL No. 2804

Case No. 1:17-md-2804

Hon. Dan Aaron Polster

**OBJECTION TO ORDER REGARDING
ADJUDICATION OF PLAINTIFFS' PUBLIC NUISANCE CLAIMS**

Certain defendants ("Defendants")¹ respectfully submit this objection to the Court's Order Regarding Adjudication of Plaintiffs' Public Nuisance Claims ("Order"). Dkt. No. 2629.

The Order stated:

The Court asked the parties to submit memoranda stating their positions regarding a Seventh Amendment right to a jury trial of the Ohio public nuisance claims. Following consideration of these memoranda, the Court convened a conference to discuss the issues with the parties and stated it intended to allow a jury to decide liability, and the Court would then decide abatement remedies in a subsequent proceeding, if necessary. The Court invited submission of supplemental memoranda if any party believed this approach would be error.

Plaintiffs did not file any supplemental position paper, indicating acquiescence with the Court's intended approach. Numerous defendants submitted a position paper explicitly consenting to a two-phase trial, where (i) the jury will determine nuisance liability

¹ AmerisourceBergen Drug Corp., Cardinal Health, Inc., Henry Schein, Inc., McKesson Corporation, and Walgreen Co.

and (ii) the Court will determine remedies, if any. The only objection to this trial method is asserted by Janssen

Id. at 1–2.² Defendants submit this memorandum to restate their position regarding their Seventh Amendment rights. While Defendants agreed then, and agree now, that a two-phase trial is appropriate, their submission did not stop there. To the extent the Order can be read as stating that Defendants consented to Plaintiffs’ view (and the Court’s ruling) that the “abatement” relief that would be determined in the second phase is, in fact, an equitable remedy that is not subject to the Seventh Amendment, Defendants did not so consent and object to the Order as not accurately reflecting Defendants’ position.

On September 13, 2019, Defendants submitted a position paper regarding the right to a trial by jury of Plaintiffs’ nuisance claims. Dkt. No. 2599. In that paper, Defendants explained that they “are entitled under the Seventh Amendment to a jury trial regarding remedies where—as here—the relief sought by Plaintiffs is the payment of money and does not fit within any exception to the general rule that monetary relief is legal.” *Id.* at 5 (collecting cases).

Defendants further explained that, while “Plaintiffs seek billions of dollars in damages from Defendants under the guise of ‘abatement,’” the “label used by Plaintiffs ... has no effect on Defendants’ right to a jury trial as to claims—like the nuisance claim here—that seek monetary relief.” *Id.* at 6 n.6 (collecting cases). Finally, Defendants made clear that they did not “waive their right to a jury trial on any issues so triable, including the issue of remedies.” *Id.* at 8.

Defendants reiterated that position both during the teleconference with the Court and in response to the Court’s invitation to submit supplemental memoranda. For example, Defendants

² The Court similarly suggested, in denying certain defendants’ disqualification motion, that “[i]t was *defendants* who argued” that “the question of abatement remains for the Court.” Dkt. No. 2676 at 9 (emphasis in original).

filed a supplemental memorandum expressly to “preserve their objection that the remedy sought by Plaintiffs under their nuisance claim—i.e., the payment of money—(i) does not constitute abatement, and (ii) is legal, not equitable, relief to which a Seventh Amendment jury trial right attaches.” Dkt. No. 2620 at 2.

Accordingly, Defendants respectfully object to the Order to the extent that it may be read to suggest that Defendants waived their right under the Seventh Amendment to a jury trial regarding damages (including any “abatement” remedy that involves the payment of money).

Dated: October 11, 2019

/s/ Geoffrey E. Hobart

Geoffrey E. Hobart
Mark H. Lynch
Christian J. Pistilli
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street NW
Washington, DC 20001
Tel: (202) 662-5281
ghobart@cov.com
mlynch@cov.com
cpistilli@cov.com

Counsel for McKesson Corporation

/s/ Kaspar Stoffelmayr

Kaspar Stoffelmayr
BARTLIT BECK LLP
54 West Hubbard Street
Chicago, IL 60654
Tel: (312) 494-4400
Fax: (312) 494-4440
kaspar.stoffelmayr@bartlitbeck.com

Counsel for the Walgreen Co.

Respectfully submitted,

/s/ Robert A. Nicholas

Robert A. Nicholas
Shannon E. McClure
REED SMITH LLP
Three Logan Square
1717 Arch Street, Suite 3100
Philadelphia, PA 19103
Tel: (215) 851-8100
Fax: (215) 851-1420
rnicholas@reedsmith.com
smcclure@reedsmith.com

Counsel for AmerisourceBergen Drug Corporation

/s/ Enu Mainigi

Enu Mainigi
F. Lane Heard III
Steven M. Pyser
Ashley W. Hardin
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
Telephone: (202) 434-5000
Fax: (202) 434-5029
emainigi@wc.com
lheard@wc.com
spyser@wc.com
ahardin@wc.com
Counsel for Cardinal Health, Inc.

/s/ John P. McDonald

John P. McDonald

jpmcdonald@lockelord.com

C. Scott Jones

sjones@lockelord.com

Lauren M. Fincher

lfincher@lockelord.com

Brandan J. Montminy

brandan.montminy@lockelord.com

LOCKE LORD LLP

2200 Ross Avenue

Suite 2800

Dallas, TX 75201

T: 214-740-8445

F: 214-756-8110

Counsel for Henry Schein, Inc.

CERTIFICATE OF SERVICE

I, Geoffrey E. Hobart, hereby certify that the foregoing document was served via the Court's ECF system to all counsel of record.

/s/ Geoffrey E. Hobart
Geoffrey E. Hobart